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In the Supreme Court of the United States

OCTOBER TERM, 1976

HAZELWOOD SCHOOL DISTRICT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1b-32b) is reported at 534 F.2d 805. The opinion of the district court (Pet. App. 1a-26a) is reported at 392 F. Supp. 1276.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1976 (Pet. App. 1c), and a timely petition for rehearing was denied on May 25, 1976 (Pet. App. 1d). The petition for a writ of certiorari was filed on August 20, 1976, and was granted on January 10, 1977. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals properly ruled that petitioners failed to rebut a *prima facie* case of employment discrimination that was based upon statistical data, a history of racial discrimination, the absence of articulated hiring standards and evidence of individual discriminatory acts.

2. Whether Title VII of the Civil Rights Act of 1964 is unconstitutional as applied to state and local governments.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the United States Constitution and of Title VII of the Civil Rights Act of 1964 are set forth in the petition for a writ of certiorari (Pet. 2-3), and petitioners' brief (Pet. Br. 2-3).

STATEMENT

On August 9, 1973, the United States brought suit under Title VII of the Civil Rights Act of 1964, 78 Stat. 253 *et seq.*, as amended, 42 U.S.C. (and Supp. V) 2000e *et seq.*, and the Fourteenth Amendment to the Constitution, charging racial discrimination in the employment practices of petitioners Hazelwood School District ("the District"), the Superintendent of Schools, and the members of the Hazelwood Board of Education (A. 2-6).[1] The United States alleged that

[1] Jurisdiction was invoked under Section 707 of the Civil Rights Act of 1964, 78 Stat. 261-262, as amended, 42 U.S.C. (and Supp. V) 2000e-6.

the District had engaged in a pattern or practice of racial discrimination in failing to employ black applicants who were as well or better qualified to teach than whites who were hired instead, and in its recruiting practices and selection procedures—all of which perpetuated the effects of past discrimination (A. 3-4). The United States sought an injunction to require the District to cease discriminatory practices, to take affirmative action to obtain black faculty and to make offers of employment and back pay to black persons who were discriminatorily rejected (A. 5).

The Hazelwood School District occupies 78 square miles of northern St. Louis County, Missouri (Pet. App. 2a, 3b). In terms of student population, it is the fourth largest school district in the state.[2] In the 1972-73 school year, the District operated 23 schools, enrolling 25,166 students (Pet. App. 3a, 3b). In the 1973-74 school year, the District employed a total of 1,231 teachers (Pet. App. 3a, 4b). At trial, the United States presented evidence to show that the Hazelwood School District had engaged in a continuing practice of discrimination in the recruitment and hiring of these teachers.

Prior to this Court's decision in *Brown* v. *Board of*

[2] *Directory of Public Elementary and Secondary Schools in Selected Districts*, U. S. Department of Health, Education, and Welfare, Office of Civil Rights, pp. 746-786 (1972). The District was formed between 1949 and 1951 from 13 rural school districts (Pet. App. 2a) and serves Hazelwood, Black Jack, Cross Keyes, Shoveltown, Spanish Lake and other communities in northern St. Louis County. The District borders for a short distance on the St. Louis City School District (Pet. App. 3b). The residents of the District are predominantly white (Pet. App. 2a-3a, 3b).

Education, 347 U.S. 483, the Constitution of the State of Missouri mandated racially segregated schools (Pet. App. 17a, 3b). School districts in St. Louis County assigned black faculty exclusively to blacks schools and white faculty to white schools (A. 414-426; Pet. App. 3b).[3] Since no blacks lived in the Hazelwood District prior to 1954, the District did not either operate a black school or employ black faculty (Pet. App. 2a, 3b; A. 423, 426). Beginning in 1954, a small number of blacks began to move into the District (Pet. App. 2a),[4] and some time prior to 1964 the school board adopted a formal policy "to hire all teachers on the basis of training, preparation and recommendations, regardless of race, color or creed" (Pet. App. 3b-4b).

Nevertheless, the District's teacher recruitment and selection policies continued to reflect the influence of racial criteria. As late as 1962-63, some teacher application forms requiring racial identification were still in use (Pet. App. 4a, 3b), and in 1962 the District placed an employment advertisement in the *Clarion-Ledger Jackson Daily News* in Jackson, Mississippi, requesting

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[3] See also *United States* v. *State of Missouri*, 363 F. Supp. 739, 743-745 (E.D. Mo.), in which the district court discusses the racially segregative employment practices of other school districts in St. Louis County.

[4] The school board minutes for November 20, 1954, state (A. 428):

> Superintendent Kirby informed the Board of property in the District that had been rented to persons of the Negro race, but stated he had no knowledge as to whether they had children of school age. After deliberation the Superintendent was instructed to admit resident negro children, but in view of their being so decidedly in the minority, he was further instructed to offer payment of tuition to negro pupils to a school of more predominantly negro enrollments • • •.

"white only" applicants for kindergarten and elementary school teaching positions (Pet. App. 3b; A. 71). Although the District personnel director engaged in extensive recruiting of teacher applicants at colleges and universities throughout Missouri, Illinois, Arkansas, Kansas, and Oklahoma (Pet. App. 3a, 4b), the District did not recruit at either of the two predominantly black four-year colleges in Missouri—Harris Teachers College and Lincoln University—or at any other predominantly black school (Pet. App. 3a-4a, 4b). The former superintendent of schools stated on deposition that he never recruited at Lincoln University because "[i]n the early years of my superintendency that was a Negro university" (A. 55). This racially selective recruiting pattern apparently continued to the date of trial.[5]

Selection of teachers from those who do apply for positions in the District involves a virtually standardless process (Pet. App. 12b). When a vacancy occurs, the director of the personnel office selects applicants in the field of the vacancy for interviews (Pet. App. 4b).[6] The District did not offer evidence of any official policy

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[5] See Hord Deposition 6-7, 9-10, 23-26; Defendants' Response to Plaintiff's Request for Admissions, No. 46, filed October 1, 1973.

[6] Applicants for teaching positions in the District are required to complete an application form, which is kept on file in the District's personnel office (Pet. App. 4b). Applications are kept in an "active" file in alphabetical order (McDonald Deposition 29). Each fall the District asks all applicants to update their files; any which are not updated are destroyed (Pet. App. 4a, 4b). As long as an applicant's file is active he or she is eligible for consideration for vacancies in his or her field (Hord Deposition 15-16). A candidate must file a written application in order to be interviewed, and must be interviewed in order to be hired (Hord Deposition 18-19).

that would indicate the basis upon which particular applicants were chosen for interviews. Some testimony indicated that priority is given to those applicants who have most recently come to the attention of the personnel office or who have otherwise notified the office of their continuing availability (Pet. App. 5b-6b).[7] The adverse experience of black applicants suggested that even these "policies" were not, however, applied uniformly.[8]

Chosen applicants are interviewed by the school principals and the department chairmen (Pet. App. 6b-7b). In practice the principal's recommendation is almost

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[7] The personnel office does not make substantive decisions regarding the qualifications of applicants in the course of this selection, beyond checking to determine whether the applicant has, or is eligible for, Missouri certification (Pet. App. 4a-5a, 5b).

[8] A number of black applicants were not interviewed even though their applications were more recent than those of whites who were interviewed and hired. For example, Delores Penton applied for a teaching position in grades K-5 in an application received by the District on June 26, 1973 (Pl. Ex. 68). Between June 27, 1973, and October 18, 1973, the District hired five whites who had applied before Mrs. Penton for positions Mrs. Penton had sought (Pl. Ex. 2, Vol. III, pp. 198-220; Vol. V, pp. 134-142; Vol. VI, pp. 280-287; Vol. VII, pp. 81-88, 349-356). One applicant had applied as early as December 6, 1972 (Pl. Ex. 2, Vol. V, pp. 134-142). Alexis Smith applied for a position teaching at the elementary level in an application received by the District on April 21, 1972 (Pet. App. 22b). The court of appeals found that twenty-five white teachers were hired as elementary teachers for the 1972-73 school year, many of whom had applied much earlier than Ms. Smith (see, *e.g.*, Pl. Ex. 2, Vol. VI, pp. 59-67; Vol. VII, pp. 151-158, 483-495; Vol. VIII, pp. 201-209; 425-434; Vol. IX, pp. 43-50; Vol. X, pp. 23-31, 32-40; A. 230-244). Other black applicants failed to receive interviews in spite of persistent efforts to reemphasize their availability. See testimony of Derek Novel (Tr. 158-159), Cynthia Edmond (A. 85-86), and Delores Penton (Tr. 179).

always adhered to (*ibid.*). The only guidance given to the principals is a general instruction to "hire the 'most competent' person available" for the position to be filled (Pet. App. 7b; A. 60-61). "In Hazelwood * * * each principal is vested with almost total discretion in hiring teachers for his school" (Pet. App. 12b).[9]

Statistical evidence introduced by the United States indicated that these recruiting patterns and hiring procedures operated to exclude black applicants from employment. In 1970 more than 12 percent of all elementary and secondary teachers in the St. Louis Standard Metropolitan Statistical Area and more than 15 percent of such teachers in St. Louis City and County were black (Pl. Ex. 53, pp. 27-303, 27-331; Pet. App. 18a, 4b). By contrast the District hired no black teacher until 1969 (Pet. App. 3a, 4b), and employed only six blacks (.6 percent of the teachers in the District) in 1970-71 (Pet. App. 3a, 4b). The District hired 234 new teachers in 1971-72, and 282 in 1972-73 (Pet. App. 7b). Yet in 1972-73, 13 blacks were employed out of a total of 1,107 teachers (1.2 percent) (Pet. App. 3a). And for the 1973-74 school year the District employed 22 black teachers out of a total of 1,231 (1.8 percent) (Pet. App. 3a, 4b).[10]

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[9] The District gives preference in hiring to applicants who have successfully performed student teaching there (Pet. App. 6a, 17b-18b). However, Robert Howell and Georgia Shaw, two black applicants who successfully completed student teaching at Hazelwood, were not granted interviews (see pp. 59-61, *infra*).

[10] At the time the District was notified that the United States was considering filing a Title VII suit against it (October 27, 1972, see Pl. Ex. 58), Hazelwood employed a total of 10 black teachers. See Plaintiff's Request for Admissions, Appendix A, filed on August 23, 1973; Defendants' Answer to Plaintiff's Interrogatories, Exhibit

To support the *prima facie* showing that included a history of pre-Act racial discrimination, current standardless procedures and a continuing statistical pattern of disproportionate employment, the United States introduced evidence that more than fifty black applicants had been rejected for employment between 1970 and 1973 and that subsequent to each black's application, vacancies in the applicant's field were filled by whites who were not as well qualified, or were no better qualified (Pet. App. 4b).

The United States claimed that the combination of a history of discrimination, statistical disparities in hiring, standardless hiring procedures and the instances of individual discrimination constituted a *prima facie* case of a pattern and practice of employment discrimination in violation of Title VII. Nevertheless, the District introduced very little evidence to rebut the *prima facie* case. As summarized by the court of appeals (Pet. App. 7b):

> * * * Hazelwood relied almost entirely upon its cross-examination of the Government's witnesses. Hazelwood introduced only one witness and several exhibits of its own. The witness testified to the total number of teachers who applied and were hired during the 1971-72 and [1972-73] school years—3,127 of which 234 were hired in 1971-72 and 2,373 of which 282 were hired in 1972-73. The exhibits consisted of the policy manual, policy book, staff handbook, and

2, filed on October 1, 1973. Thus, more than half of all of the blacks employed by Hazelwood at the time of trial (22) had been hired after the District was aware that its hiring practices were under scrutiny.

> historical summary of the formation of the Hazelwood School District.

Hazelwood argued that the court could not make a finding of discrimination because equal employment opportunity was the official policy of the District and because the small number of its black teachers was comparable to the proportion of black students enrolled in Hazelwood's schools.

After trial, the district court held that the United States failed to prove that petitioners had engaged in racially discriminatory hiring practices (Pet. App. 23a, 25a). The court found that the United States had not demonstrated a statistical disparity sufficient to constitute a *prima facie* showing of discrimination, because less than two percent of the children in the Hazelwood District schools are black (Pet. App. 19a). The court also held that there was no basis in the record for concluding that the District acted in a discriminatory fashion in failing to hire those rejected black applicants identified by the United States (Pet. App. 23a-25a).

The court of appeals reversed. Rejecting the district court's analysis of the statistical evidence, the court of appeals stated that "[t]he level of black student enrollment in Hazelwood school[s] sheds no light whatsoever upon the dispute before us" (Pet. App. 11b). The relevant consideration was the demonstrated statistical disparity "between the proportion of blacks in the employer's workforce and the proportion of blacks in the labor market" (Pet. App. 11b). The court also held that the finding of nondiscrimination with regard to 16 of the rejected black applicants was clearly erroneous

since the United States "established a *prima facie* case of discrimination which was not rebutted by Hazelwood" (Pet. App. 17b). Finally, the court ruled that the evidence adduced at trial demonstrating a statistical disparity between the racial composition of Hazelwood's work force and the labor market, the use of standardless hiring procedures, the history of discrimination in hiring, and the evidence that 16 teacher applicants were discriminatorily rejected was sufficient to establish a *prima facie* case of a pattern and practice of racial discrimination—a showing that petitioners did not rebut. "We have concluded that, from its establishment in 1949-1951 until at least March 1974, Hazelwood has engaged in a pattern or practice of discriminatorily failing and refusing to hire blacks in violation of the Act" (Pet. App. 3b).

The court of appeals ordered both injunctive and compensatory relief. Hazelwood was permanently enjoined from discriminating in the hiring of teachers on account of race or color (Pet. App. 26b) and ordered to promulgate accurate job descriptions and hiring criteria, to recruit on an equal basis (Pet. App. 26b-27b), and to place the 16 discriminatorily rejected black applicants on a "preferred hiring list" (*id.* at 27b). The court of appeals directed the district court to award back pay to two rejected applicants and to determine whether back pay should be awarded to the other 14 applicants (*ibid.*).[11]

[11] One judge dissented, on the grounds that the evidence of discrimination was inconclusive, the majority's rationale created a preference for black applicants, and the remedial order was overly broad (Pet. App. 28b-32b). The petition for a writ of certiorari filed in this Court, however, presents no question concerning the scope of the remedial order.

SUMMARY OF ARGUMENT

I.

The court of appeals determined that a history of discriminatory teacher recruiting practices, a substantial statistical disparity in black teacher employment, the presence of an arbitrary hiring process, and specific acts of discrimination against 16 individual black applicants for teaching positions, together established a *prima facie* case of a pattern and practice of employment discrimination. Petitioners offered almost no rebuttal evidence in the district court (Pet. App. 7b), and the court of appeals correctly held that petitioners' failure to rebut the government's *prima facie* case warranted a finding of discrimination in violation of Title VII.

The court of appeals properly concluded that evidence of an uninterrupted history of discrimination against black teacher applicants supported the inference of a pattern and practice of discrimination. Prior to this Court's decision in *Brown* v. *Board of Education,* 347 U.S. 483, Hazelwood together with all other school districts in Missouri was required by state law to maintain a segregated school system. Although segregation was officially ended in 1954, no black teacher was hired until 1969. Hazelwood's application forms and advertising continued to utilize racial criteria during the early 1960s. Although Hazelwood recruited for teachers at predominantly white colleges, "Hazelwood officials have never recruited from any predominantly black college" (Pet. App. 9b). This continuing history of racial discrimination was relevant to show that present policies "perpetuate past discriminatory practices"

(Pet. App. 9b). *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418 (C.A. 5); *United States* v. *Sheet Metal Workers, Local 36*, 416 F.2d 123 (C.A. 8).

The court of appeals also relied upon a statistical showing that in 1970 approximately 15 percent of the teachers in St. Louis City and County were black, while the percentage of black teachers at Hazelwood ranged between 0 in 1969 and 1.8 percent in 1973-74. More than half of this black teacher population was hired after the District was informed that its hiring practices were under scrutiny. Cf. *Jenkins* v. *United Gas Corp.*, 400 F.2d 28, 33 (C.A. 5). Petitioners now claim that the recruiting practices of St. Louis City schools deprive Hazelwood of black applicants, but no evidence to that effect was offered in the district court. Indeed, the record demonstrates that St. Louis City schools are a major source of Hazelwood's black applicants, that other suburban schools have had no difficulty in maintaining a more representative black faculty, and that even if St. Louis City is removed from the data base, there remains a significant disparity between Hazelwood's black work force and that of the other districts in the county. Petitioners argue that applicant success rates are better evidence of discrimination. But reliable applicant statistics are not available, and any applicant data would reflect Hazelwood's present and past racially selective recruiting, and its reputation for discrimination. Finally, there is no error in using employment statistics that reflect both past and present teacher selection decisions since past employment actions may shed light on present policies that may violate Title VII. *Buckner* v. *Goodyear Tire and Rubber Company*, 339 F. Supp. 1108 (N.D. Ala.), affirmed, 476 F.2d 1287

(C.A. 5); cf. *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation*, No. 75-616, decided January 11, 1977, slip op. 14.

Adding to the inference from the history of discrimination and the statistical disparity was evidence that Hazelwood's hiring practices were arbitrary. Although the record demonstrated that the absence of either objective or subjective standards had resulted in a disproportionately white faculty, petitioners failed to introduce evidence to prove that the procedures were not utilized in a discriminatory fashion. In the absence of any explanation from the District "race is the only identifiable factor explaining the disparity." *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377, 1382 (C.A. 4), certiorari denied, 409 U.S. 982.

The final element supporting the decision that a *prima facie* case had been established was the individual findings of discrimination against 16 black applicants. In each case, the court of appeals applied the four-pronged test of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802. In each case, petitioners failed to introduce any rebuttal evidence to demonstrate that in fact the failure to interview or hire these applicants was not the result of racial discrimination. Independently of any statistical showing, the court of appeals found discrimination in these individual cases because of the failure to rebut the *prima facie* demonstration as to each applicant.

Thus, on the basis of a cumulative inference properly derived from the history, statistics, hiring practices, and individual showings of discrimination introduced into evidence, the court of appeals held that a *prima facie* case of a pattern and practice of discrimination

had been shown. "Hazelwood offered no evidence adequate to rebut the inference of discrimination" (Pet. App. 15b). Petitioners' post-trial efforts to assert possible explanations for the *prima facie* showing are without evidentiary support, and in any event are unpersuasive.

II

Petitioners assert that the application of Title VII to unintentional discrimination by state and local governments exceeds Congress' power under the Commerce Clause and Section 5 of the Fourteenth Amendment. The premise underlying petitioners' argument—that the court of appeals made no determination of purposeful racial discrimination—is erroneous. The government's announced intention was to prove that the employment discrimination was the result of purpose, and although the court of appeals did not use the words "purposeful" or "intentional" it determined whether the black applicants were rejected "because of" or "on account of" race (Pet. App. 17b-25b). The evidence established intentional discrimination in pre-Act hiring of teachers on the basis of race, and that recruitment of teacher applicants was, and continued to be, deliberately carried out on a racially discriminatory basis. After examining Hazelwood's standardless hiring procedures the court of appeals concluded that "[i]n our view, it is more than mere coincidence that the use of [Hazelwood's hiring] procedures produced only a few black teachers" (Pet. App. 12b). In addition the court found specific "evidence of actual discriminatory practices * * * in the rejection of some 16 black applicants" (Pet. App. 14b).

The court of appeals' use of historical and statistical evidence of racial impact as well as instances of individual discrimination thus was a proper "inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights* v. *Metropolitan Housing Development Corp., supra,* slip op. 13. And the court's decision involves only the congressional allocation of proof burdens under Title VII in a case where there was direct evidence of intentional discrimination, and does not involve any substantive expansion of the constitutional prohibition in the Fourteenth Amendment. Cf. *South Carolina* v. *Katzenbach,* 383 U.S. 361; *Georgia* v. *United States,* 411 U.S. 526; *Beer* v. *United States,* 425 U.S. 130.

The application of Title VII to prohibit discrimination by a public employer is a proper exercise of congressional power. In enacting the 1972 amendments applying Title VII to the states, Congress exercised its authority under both the Commerce Clause and Section 5 of the Fourteenth Amendment. The legislative history reflects a determination that "[l]egislation to implement this aspect of the Fourteenth Amendment was long overdue." H.R. Rep. No. 92-238, 92d Cong., 1st Sess., pp. 18-19 (1971). Remedial legislation of this kind, although it may intrude into "spheres of autonomy previously reserved to the States," has been consistently sanctioned as an appropriate exercise of Congress' power under the post-Civil War amendments. *Fitzpatrick* v. *Bitzer,* 427 U.S. 445, 455.

Title VII can also be independently sustained under the commerce power because its implementation of the Fourteenth Amendment commands does not interfere with any attribute of state sovereignty constitutionally

insulated from the congressional exercise of the commerce power. See *Usery* v. *Allegheny County Institution District,* 544 F.2d 148 (C.A. 3), certiorari denied, No. 76-1010, March 28, 1977. The mandate not to discriminate on the basis of race does not interfere with the discretion of state and local governments in determining the number of employees hired, their functions, hours or wages, and compliance with Title VII costs the state nothing. Cf. *National League of Cities* v. *Usery,* 426 U.S. 833.

ARGUMENT

I

THE COURT OF APPEALS PROPERLY RULED THAT PETITIONERS FAILED TO REBUT A *PRIMA FACIE* CASE OF EMPLOYMENT DISCRIMINATION THAT WAS BASED UPON STATISTICAL DATA, A HISTORY OF RACIAL DISCRIMINATION, THE ABSENCE OF ARTICULATED HIRING STANDARDS, AND EVIDENCE OF INDIVIDUAL ACTS OF DISCRIMINATION

The court of appeals explained that a combination of four factors led it to conclude that the United States had established a *prima facie* case that petitioners had engaged in a pattern and practice of discrimination in violation of Title VII of the Civil Rights Act of 1964 (Pet. App. 8b; footnotes omitted):

Evidence was adduced at trial demonstrating (1) a

history of discriminatory practices in the hiring of teachers by Hazelwood prior to the effective date of Title VII, (2) a statistical disparity between the proportion of blacks in Hazelwood's workforce and the proportion of blacks in the labor market, (3) an unstructured decentralized hiring process in which subjective criteria predominate in evaluating candidates, and (4) specific discrimination against 16 black applicants for teaching positions at Hazelwood. After considering this evidence, we conclude that a *prima facie* case of discrimination was made out by the Government.

Having failed in the district court to introduce evidence to rebut the inference arising from these four separate evidentiary showings, petitioners attempt to relitigate those issues here. Petitioners misconceive the role of a reviewing court in a Title VII case, and its tardy response in this Court to the *prima facie* showing of discrimination is largely based upon assertions that are either unsupported in the record or demonstrably in error.

A. THE EVIDENCE SHOWED AN UNINTERRUPTED HISTORY OF DISCRIMINATION AGAINST BLACKS IN PETITIONERS' HIRING OF TEACHERS

Although statutorily mandated segregation officially ended in 1954, with this Court's decision in *Brown* v. *Board of Education,* 347 U.S. 483, the record here indicates that Hazelwood continued to discriminate against blacks in staffing the Hazelwood District

schools.[12] Indeed, Hazelwood employed no black teachers during nearly the first twenty years of its existence. Although the District adopted sometime prior to 1964 a formal policy "to hire all teachers on the basis of training, preparation and recommendations, regardless of race, color or creed," no black was hired until 1969 (Pet. App. 3a, 3b-4b). As the Fifth Circuit has noted, nothing is more emphatic than zero. *United States* v. *Hinds County School Board,* 417 F.2d 852, 858.

This exclusion of black teachers apparently was no accident. Some teacher application forms continued to require a racial designation as late as the 1962-63 school year.[13] In 1962, the District placed an advertisement in the Jackson, Mississippi, *Clarion-Ledger* announcing that "Kindergarten and Elementary teachers (white only)" were needed in the District (A. 71).[14] Finally,

[12] Petitioners claim that there is not "any 'historical background' of racially motivated discrimination at Hazelwood. • • • The doors of Hazelwood's schools are and have been open to blacks—teachers as well as students" (Pet. Br. 29). This is contrary to the court of appeals' findings, and, indeed, petitioners acknowledge elsewhere that prior to 1954 "only white teachers were allowed to teach in schools with white students and only black teachers in schools with black students" in public schools throughout Missouri (Pet. Br. 7).

[13] It was not disputed in the courts below that Hazelwood used such forms until 1962-63 (cf. Pet. Br. 11, 59). Both courts so found (Pet. App. 4a, 3b) based upon defendants' answer to plaintiff's interrogatories (Answer to Interrogatories of February 4, 1974, No. 12). Samples of Hazelwood application forms containing spaces for racial designation are contained in Plaintiff's Exhibit 62.

[14] Petitioners argue that the "white only" phrase "may or may not have been in the School District's copy as submitted" (Pet. Br. 10). The court of appeals specifically found that "Hazelwood placed" the advertisement (Pet. App. 9b). Petitioner does not

although the Hazelwood School District has recruited teacher applicants at predominantly white colleges and universities throughout a five-state area, Hazelwood never engaged in such recruiting efforts at the two predominantly black teacher training colleges in Missouri.[15] Indeed, the court of appeals noted (Pet. App. 9b): "Hazelwood officials have never recruited from any predominantly black college."

The history of pre-1954 *de jure* discrimination, the failure to hire blacks in any numbers prior to 1971 and the unrebutted evidence that recruiting continued to be influenced by racial criteria support an inference of discrimination. As the court of appeals stated, "[the

contend that this finding is clearly erroneous, and, indeed, it is supported by the record. The present superintendent of schools testified that the advertisement "was placed by the superintendent's office" (A. 62), and there was uncontroverted testimony by employees of the *Clarion-Ledger* that the newspaper printed advertisements in exactly the form received (A. 69-70, 75-76).

[15] Petitioners attempt to minimize this failure to recruit on an equal basis by characterizing it as a failure to engage in "affirmative action" (Pet. Br. 29) and by suggesting that such recruitment would have been fruitless in any event because "there was little interest in all-white Hazelwood among black students who foresaw a seller's market for their services" (Pet. Br. 11). No evidence supports this assertion. Since there was a seller's market for the services of both white and black teachers, the logical response would have been for Hazelwood to recruit wherever qualified teachers could be found. In light of testimony by the former superintendent that teachers were not recruited at Lincoln University because it was "a Negro university" (p. 5, *supra*) and the District's extensive recruiting efforts elsewhere, Hazelwood's actions in this regard reflect more than a mere failure to engage in "affirmative action." Moreover, the fact that there was a seller's market for teachers in the early sixties does not explain why Hazelwood continued to recruit only at predominantly white schools when a buyer's market existed.

history of discrimination] is highly relevant to show that present policies or practices, which appear neutral on their face, perpetuate past discriminatory practices" (Pet. App. 9b). *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418 (C.A. 5); *United States* v. *Sheet Metal Workers, Local 36*, 416 F.2d 123 (C.A. 8).

B. THE UNEXPLAINED STATISTICAL DISPARITY BETWEEN THE PARTICIPATION OF BLACKS IN PETITIONERS' WORK FORCE AND THEIR PARTICIPATION IN THE RELEVANT LABOR MARKET SUPPORTS AN INFERENCE OF DISCRIMINATION

"There is virtual unanimity on the proposition that the showing of a statistical disparity between the proportion of blacks in the employer's workforce and the proportion of blacks in the relevant labor market makes out a *prima facie* case of discrimination in violation of Title VII" (Pet. App. 9b).[16] "In the problem of racial discrimination, statistics often tell much, and Courts listen." *Alabama* v. *United States*, 304 F.2d 583, 586 (C.A. 5), affirmed *per curiam*, 371 U.S. 37. Discriminatory impact often supports reasonable inferences about conduct and motivation. For that reason, as this Court made clear in *Village of Arlington Heights* v. *Metro-*

[16] See, *e.g.*, *United States* v. *Wood Lathers, Local 46*, 471 F. 2d 408 (C.A. 2), certiorari denied, 412 U.S. 939; *United States* v. *Chesapeake and Ohio Ry. Co.*, 471 F.2d 582 (C.A. 4), certiorari denied, 411 U.S. 939; *Rowe* v. *General Motors Corp.*, 457 F.2d 348 (C.A. 5); *United States* v. *St. Louis-San Francisco Ry. Co.*, 464 F.2d 301 (C.A. 8); *Carter* v. *Gallagher*, 425 F.2d 315 (C.A. 8), modified on rehearing *en banc*, 452 F.2d 315, certiorari denied, 406 U.S. 950.

politan Housing Development Corporation, No. 75-616, decided January 11, 1977, slip op. 3, "[t]he impact of * * * official action," which is often demonstrated through the use of statistics, "may provide an important starting point" in an attempt to show racial discrimination. *Yick Wo* v. *Hopkins*, 118 U.S. 356, 374; *Gomillion* v. *Lightfoot*, 364 U.S. 339, 341. In "extreme" cases, such as *Gomillion* and *Yick Wo*, the inference may be irresistible because it is impossible to conceive that non-invidious actions could have resulted in such starkly discriminatory patterns. In other cases the inferences from statistical evidence, while not irresistible, may substantially aid the finder of fact in determining whether a party's conduct is unlawful.

Absent discrimination, Hazelwood's work force statistics would ordinarily be expected to approximately mirror the share of black teachers in the workforce of other districts in the general employment area. That assumption will, of course, not always prove correct, but the likelihood of its correctness is sufficient to establish a rebuttable presumption. See IX Wigmore, *Evidence*, §§ 2487-2490 (3d ed. 1940). A low percentage of blacks in an employer's work force may reflect the accumulated effects of discriminatory recruitment, reputation as a discriminatory employer, and discriminatory hiring practices. Because all of these factors can be reflected in evidence of a statistical disparity, such evidence is highly relevant in an employment discrimination suit.

Once evidence of a substantial statistical disparity is presented, the defendant has the right to demonstrate that the disparity is not the result of discriminatory ac-

tions, but has been caused by other, racially neutral factors. Such statistics, while "not necessarily satisfying the whole case, have critical, if not decisive, significance—certainly, at least in putting on the employer the operational burden of demonstrating why, on acceptable reasons, the apparent disparity is not the real one." *Rowe* v. *General Motors Corp.*, 457 F.2d 348, 358 (C.A. 5). The function of statistics in shifting the evidentiary burden in a racial discrimination case is familiar to this Court as a result of its frequent use in jury selection cases. See, *e.g., Norris* v. *Alabama,* 294 U.S. 587; *Hernandez* v. *Texas,* 347 U.S. 475; *Turner* v. *Fouche,* 396 U.S. 346; *Castaneda* v. *Partida,* No. 75-1552, decided March 23, 1977.

Of course, as the court of appeals was well aware, "caution is necessary when using statistical evidence" in order to ensure that the patterns of professional employment are correctly analyzed (Pet. App. 8b, n. 5). "The raw data often will obscure the actual number of persons in the general workforce, white and black, who possess the special qualifications needed for particular openings" (*ibid.*). In order to ensure meaningful analysis, the court of appeals utilized only data concerning actual employment of teachers from surrounding school districts and confined the statistical base to "that area from which the employer draws its employees" (Pet. App. 10b, n. 7). Cf. *United States* v. *Ironworkers, Local 86,* 443 F.2d 544 (C.A. 9).

The uncontradicted testimonial and documentary evidence shows that the vast majority of Hazelwood teachers come from the St. Louis City and County

area.[17] Approximately 80 percent of the teachers hired by Hazelwood between October 1972 and September 1973 resided in St. Louis City and County at the time of their initial employment, and "[a]pproximately one-third of the teachers hired during this period resided in the City of St. Louis and 40 percent resided in areas of St. Louis County other than the Hazelwood District" (Pet. App. 10b, n. 7).[18]

Comparison of the percentage of black teachers in St. Louis City and County with the percentage of teachers in the Hazelwood School District provides compelling *prima facie* statistical evidence of discrimination by the District. Between 1949-1951 (when the District was established) and 1969, the District employed no black teachers (Pet. Br. 7). In 1969, the District employed one black teacher,[19] and in 1970-71 blacks

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[17] The source of the residence figures relied upon by the court of appeals is Exhibit 2, attached to Defendants' Answer to Plaintiff's Interrogatories, filed on October 1, 1973 (cf. Pet. Br. 51, n. 20). See also Hord Deposition 57.

[18] The district court's use of the percentage of black students in the Hazelwood District as a basis for comparison was particularly inappropriate because the Hazelwood School District encompasses the City of Black Jack, which has engaged in intentionally exclusionary activities in order to preclude blacks from residing in the City. *United States* v. *City of Black Jack,* 508 F.2d 1179 (C.A. 8), certiorari denied, 422 U.S. 1042.

[19] Petitioners assert that although the District employed no black teachers prior to 1969, "[o]ffers were made to black applicants for teachers' jobs before that" (Pet. Br. 7). The only evidence in the record to support this contention is a statement on deposition by Francis Huss, the Coordinator of Secondary Education (A. 52):

Q. • • • [D]o you recall when the first black faculty member was employed by Hazelwood?

represented 0.6 percent of the total teachers in the District. In 1970, the United States Census reported that more than 15 percent of the teachers in the combined St. Louis City and County area were black (Pet. App. 4b).

Hazelwood slightly increased its black faculty in the succeeding four years, but even so, the percentage of black teachers employed did not approach the 15 percent employment of blacks that could be expected absent discrimination. The only evidence on the subject introduced by petitioners indicated that the District hired in excess of 200 new teachers per year—specifically, 234 in 1971-72 and 282 in 1972-73 (see p. 7, *supra*). Yet in 1971-72 the complement of black teachers in the District increased only to seven. And in 1972-73, 13 of the District's 1,107 teachers were black (1.2 percent), while in 1973-74, after petitioners knew the District was the subject of investigation by the United States into allegations of racial discrimination,[20] the number of blacks rose only to 22 out of a total staff of 1,231 (1.8

A. The only thing I can recall, factual, is when it was done in the secondary school and I was involved in that.

Q. When was that?

A. Whenever Mrs. Davis at Hazelwood West was employed. Now this isn't the first one that was ever offered employment. She was the first one that accepted employment.

Q. How many had been offered employment?

A. I don't know.

[20] See Pl. Ex. 58 (containing a letter from the United States informing the District of its intention to file suit, and discussing a previous conference between District officials and attorneys for the United States on October 27, 1972). "[A]ctions in the face of litigation are equivocal in purpose, motive and permanence." *Jenkins* v. *United Gas Corp.*, 400 F.2d 28, 33 (C.A. 5).

percent (Pet. App. 4b; Pl. Ex. 55). The court of appeals concluded that "the size of the disparity * * * and the presence of other indicia of discrimination" (Pet. App. 8b, n. 5) were sufficient to place upon petitioners the burden of explaining the reasons for that pattern.[21]

Petitioners do not contest that the type of statistical comparison made by the court below is generally effective in demonstrating *prima facie* patterns of employment discrimination. Petitioners argue, however, that in this case the better statistical measure is a comparison of the percentage of black and white applicants who were hired in the years in question (Pet. Br. 44).

Whatever the theoretical value of such data, reliable evidence of that nature is not available. The record does not accurately establish the number of black ap-

[21] Petitioners claim that a comparison of the percentage of blacks on Hazelwood's faculty in 1973-74 with the percentage of black teachers employed in other area districts is irrelevant because they reflect hiring decisions made prior to 1972 (when Hazelwood was not covered by Title VII) as well as hiring decisions for 1972 and after (Pet. Br. 57). The District may have been covered by Title VII only since 1972, but it has always been under a Fourteenth Amendment obligation not to discriminate in hiring on account of race. Title VII was amended to cover State and local governments in order to implement the Fourteenth Amendment guarantee (see pp. 54-58, *infra*). Evidence of pre-Act discrimination is relevant, not only as the court of appeals noted (Pet. App. 16b) because it may show that present policies or practices although neutral on their face, perpetuate the effects of past discrimination, *United States* v. *Sheet Metal Workers, Local 36*, 416 F.2d 123 (C.A. 8), but also because it may shed light on present deeds or policies that may violate Title VII. *Buckner* v. *Goodyear Tire and Rubber Company*, 339 F. Supp. 1108 (N.D. Ala.), affirmed, 476 F.2d 1287 (C.A. 5); *Evans* v. *Local Union 2127, International Brotherhood of Electrical Workers, AFL-CIO*, 313 F. Supp. 1354 (N.D. Ga.).

plicants to the Hazelwood School District (see Pet. Br. 48). The method used to search Hazelwood's records in order to identify black applicants did not assure that all, or even most, were identified.[22] For example, black applicants who did not attend predominantly black high schools in St. Louis, or predominantly black colleges, or in some other manner identify themselves as black, may have been assumed to be white (see Tr. 307). The record also indicates that not all of the applications of rejected black applicants in the two years in question survived.[23] Accordingly, in introducing the evidence upon which petitioners now rely, counsel for the United States carefully noted that the list of applicants was not complete since "it has not been possible to obtain facts

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[22] The research analyst who identified possible black applicants in the Hazelwood application files described her method as follows (Tr. 307):

> I did examine applications when I was given a list of colleges and St. Louis area high schools that I was told were predominantly black and I examined applications for those people who had attended those schools and also I looked for applications that contained photographs that would indicate those persons were black and I looked for applications that had some specific racial designation on them and that list was submitted to my superior to be checked.

[23] At trial, black persons testified without contradiction that they had applied to Hazelwood and been rejected, although the District was unable to produce their application forms. See testimony of Pearlie Boyd (Tr. 62-71), testimony of Atry Cotton (Tr. 79-85), testimony of Westelle Florez (Tr. 125-129), and testimony of Jerome Trotter (Tr. 194-200). Of course, these as well as other applications might have been destroyed pursuant to District policy (see p. 5, n.6, *supra*).

on all or probably most black applicants to the district" (Tr. 9).[24]

Even if the number of blacks and the number of whites who applied for positions with the District could accurately be determined, that comparison would be of little probative value because petitioners manipulated the racial composition of the District's applicant flow so as to reduce minority representation (cf. Pet. Br. 46). As noted above, until this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483, the Hazelwood School District employed no black teachers because of the official policy of refusing to employ blacks in segregated all white schools (Pet. App. 3b). Throughout the 1950s and the 1960s, when Hazelwood engaged in extensive recruiting of teacher applicants at predominantly white colleges and universities (Pet. App. 3a, 4b), it failed to recruit at predominantly black universities.[25] Although the scope of the District's recruit-

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[24] Petitioners introduced no evidence to show the number of black applicants. Cf. *Pierre* v. *Louisiana*, 306 U.S. 354, 361-362.

[25] Recruitment practices such as those described above have been held to violate Title VII. See, *e.g.*, *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421, 427 (C.A. 8). The failure to recruit at predominantly black colleges and universities was intentional. As previously noted, the former superintendent of schools testified that he did not recruit at predominantly black Lincoln University because "that was a Negro university" (A. 55). Petitioners refer (Pet. Br. 11) to a "recruiting trip" by the personnel director to a black college at which "there was little interest in all-white Hazelwood" (Pet. App. 9b, n. 6). Almost ten years after Brown, in 1963 or 1964, the personnel director of the District visited Lincoln University. According to his testimony on deposition, he did not interview there. He talked to the placement director "about possible candidates" but "[t]he reaction at that

ing efforts was subsequently reduced, it continued to recruit only at predominantly white universities.[26] The effects of this intentional, racially selective recruiting were still being felt at the time of trial,[27] as a substantial proportion of applications continued to come from those schools at which Hazelwood had recruited in the past. Since Hazelwood intentionally neglected to establish ties with predominantly black colleges and universities, and discouraged black applicants over a period of 20 years, the racial composition of Hazelwood's applicant pool has been, and undoubtedly continues to be, distorted. In these circumstances, the principal statistical significance of accurate applicant flow data would be to show the impact, on black potential applicants, of Hazelwood's reputation and of discrimination in the District's past recruitment practices.[28]

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time was not very favorable because there was a tremendous shortage of teachers. This was the reaction from many universities" (Hord Deposition 8). Mr. Hord made no attempt then or at any later date to recruit Lincoln University graduates (*ibid.*).

[26] See discussion *supra* at pp. 18-19.

[27] For example, more than two thirds of the teachers listed by petitioners as having been hired between October 1972 and September 1973 had attended the predominantly white colleges and universities at which Hazelwood had actively recruited. Hazelwood personnel undoubtedly established relationships with the placement directors at each of these predominantly white schools at which Hazelwood recruited, and as students obtained jobs at Hazelwood its reputation as an employer also would have reached the schools from which Hazelwood recruited. Even after Hazelwood reduced the level of its active recruitment, the patterns that had been established continued. See Defendants' Answer to Plaintiff's Interrogatories, filed October 1, 1973, Exhibit 2; Defendants' Response to Plaintiff's Request for Admissions, No. 46, filed October 1, 1973.

[28] Throughout its brief, Hazelwood attempts to utilize the restricted black applicant flow as a rationale justifying the statistical

Petitioners also question the exact size of the disparity between the percentage of black teachers employed by the District and the number which would be represented in Hazelwood's work force absent discrimination, asserting that the hiring practices of the City of St. Louis divert to the city schools black applicants who might otherwise seek employment at "small outlying districts such as Hazelwood" (Pet. Br. 49-50).[29]

Nothing in the record supports the assertion that St. Louis City recruiting deprives the Hazelwood District of black applicants. Other suburban school districts that are smaller than Hazelwood do not suffer from the alleged disabling effects of St. Louis City recruit-

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disparity in its hiring of black teachers. For example, petitioners claim that even if the District had hired every qualified black applicant, its teaching staff "would have included no more than 70 blacks" (Pet. Br. 59). Since the District's hiring and recruiting policies had a profound effect on the number of blacks who applied, the applicant flow represents a present effect of past (and perhaps present) discrimination. Rather than explaining the statistical disparity, it is an independent ground for a Title VII violation. *United States* v. *Sheet Metal Workers, Local 36*, 416 F.2d 123, 131-133 (C.A. 8); *United States* v. *Local 38, IBEW*, 428 F.2d 144, 150-151 (C.A. 6), certiorari denied, 400 U.S. 943; *Local 189, United Papermakers* v. *United States*, 416 F.2d 980, 990-991 (C.A. 5), certiorari denied, 397 U.S. 919; *United States* v. *Local 1, Iron Workers*, 438 F.2d 679, 683 (C.A. 7), certiorari denied, 404 U.S. 430; *United States* v. *Local 169, Carpenters*, 457 F.2d 210, 216 (C.A. 7), certiorari denied, 409 U.S. 851.

[29] The Hazelwood District is not "small." It is the fourth largest school district in terms of student population in the State of Missouri, exceeded in size only by St. Louis City, Kansas City, and Springfield. Hundreds of school districts in Missouri are smaller than Hazelwood. *Directory of Public Elementary and Secondary Schools in Selected Districts*, U.S. Department of Health, Education, and Welfare, Office of Civil Rights, pp. 746-786 (1972).

ing.[30] Nor are teachers who are recruited by St. Louis City schools permanently removed from the pool of potential Hazelwood applicants. The record demonstrates a great deal of mobility within the teaching profession in the St. Louis area.[31] Indeed, the St. Louis school district is a prominent source of black applicants for Hazelwood. More than half of the rejected blacks whose applications were placed in evidence, and who had previous teaching experience at the time they applied to Hazelwood, had taught in the St. Louis school district.[32] Moreover, Hazelwood can hardly complain about the lack of black applicants when the record demonstrates that it failed even to interview most of the qualified blacks who did apply (Pet. App. 26b, n. 8)

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[30] For example, in 1972 Kinloch School District had an 88 percent black faculty; University City, a 26 percent black faculty; Wellston, an 80 percent black faculty; Normandy, a 13 percent black faculty; Webster Groves, a 12 percent black faculty; and Maplewood, a 10 percent black faculty (Pl. Ex. 54).

[31] Of the teachers hired by the Hazelwood District between October 1972 and September 1973, almost 45 percent had previous teaching experience. The great majority of those teachers were drawn from the St. Louis area (Pet. App. 10b, n. 7), Defendants' Answer to Plaintiff's Interrogatories, filed October 1, 1973, Exhibit 2. More than one third of the Hazelwood teachers whose applications were contained in Plaintiff's Exhibit 2 were employed as teachers at the time they applied to Hazelwood. Plaintiff's Exhibit 2 contains the employment files, including applications, of almost 500 teachers who were hired by the Hazelwood School District between 1971 and 1973. The teachers whose files were included in Pl. Ex. 2 were those who had been hired to fill positions for which rejected black applicants had previously applied (Testimony of Lucia Howard Duncan, Tr. 228-229).

[32] See Pl. Exs. 3, 8, 12, 15, 20, 21, 23, 24, 31, 32, 33, 35, 39, 44, 48, 68.

The racial statistics demonstrating substantial black teacher populations in St. Louis and in other districts merely suggest that black teachers gravitate to school districts in which jobs are open to them.[33] It would hardly be useful to compare the teacher population at Hazelwood only to those at other school districts that have discouraged black applicants. Nor is this a case where fine adjustments of statistics might eliminate some small statistical disparity. Even if the St. Louis City schools are omitted from the data base, a significant statisical disparity remains. In 1970, 5.7 percent of the teachers in St. Louis County were black (Pet. App. 19a). In that same year only 0.6 percent of the teachers on the Hazelwood faculty were black (Pet. App. 4b). Although by 1973-74 (after suit had been brought by the United States) 1.8 percent of Hazelwood's faculty was black (Pet. App. 1b, 4b), there still existed a significant statistical disparity between Hazelwood and other districts in the county that supported a *prima facie* case of employment discrimination.[34]

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[33] Many black applicants to the Hazelwood School District obtained positions in districts with substantial black teaching staffs after being rejected by Hazelwood. See, *e.g.*, Pet. App. 7a-8a (Nikki Lenoir, Alice Moore Roach, Atry Cotton); Pet. App. 9a (Robert Howell, Melvin Lowe); Pet. App. 9a-10a (James Washington); Pet. App. 11a (Naomi Cooksey); Pet. App. 12a (Samuel Downs); Pet. App. 14a (Geneice Kincaid); Pet. App. 15a (Charlene Catlin). Moreover, there is no evidence in the record that St. Louis City carried on an aggressive black teacher recruiting program prior to 1970 when the Census statistics were developed (cf. A. 92-95).

[34] Moreover, the effect of the large black teacher population in St. Louis city schools on the statistical average is at least partially offset by the abnormally low black teacher population in a number

Finally, petitioners argue that any comparison between Hazelwood's black teacher population and comparable participation of blacks in other schools is inappropriate because it "presumed that all teachers residing in that area are available for and interested in employment by Hazelwood" (Pet. Br. 51). Arguing that the validity of a workforce comparison depends upon "the inference that the labor market workforce composition is representative of those individuals who are in competition for the positions at issue" (Pet. Br. 52), petitioners state that most of the teacher work force is already employed and that the practicalities would "render impossible of achievement the racial distribution evidently contemplated by the court of appeals" (Pet. Br. 54).

Petitioners' argument is based upon a fundamental misconception concerning the role of statistics in a Title VII case.[35] Neither Title VII nor the court of appeals contemplated the achievement of a hypothetical racial distribution, and nowhere has the court or the United States suggested that Title VII requires the school district to employ any particular percentage of blacks. The statistical comparison serves only as part of the basis for making an appropriate inference as to whether a *prima facie* showing has been made that the District had engaged in discrimination on the basis

of suburban schools. For example, in 1972 the faculty of the Ferguson District was 1.3 percent black; Lindbergh was .05 percent black; Mehlville was .00 percent black; Parkway was .094 percent black; Pattonville was .051 percent black; and Rockwood was .022 percent black (Pl. Ex. 54).

[35] The argument also overlooks the evidence in this case of mobility among already employed teachers (see p. 30, *supra*).

of race. The court of appeals' assumption was not that the 15 percent of the area teacher work force that was black would be available to the District for future hiring, but that under a non-discriminatory regime one could have expected the percentage of black teachers on the Hazelwood faculty to be roughly similar to that on the average faculty elsewhere in the employment area.[36] Thus, neither the objective number nor the percentage of black teachers has independent significance; their only pertinence is in the disparity between the hiring pattern of Hazelwood and other nearby districts. Once it is understood that the statistics are being used only as a comparative measure of past hiring actions rather than as an indicator of potential future employment obligations, petitioners' extended discussion about the absolute numbers of blacks available to fill teacher jobs becomes quite beside the point.

C. PETITIONERS' STANDARDLESS HIRING PROCESS, CONSIDERED IN LIGHT OF THE UNEXPLAINED STATISTICAL EVIDENCE, ALSO EVIDENCED A PATTERN OF DISCRIMINATION

The court below recognized that the statistical evidence presented "is particularly revealing when considered in light of Hazelwood's subjectively-based selection procedures" (Pet. App. 11b-12b). The only

[36] Petitioners argue "[t]here are not enough potential black teachers in the St. Louis City and County area to allow the City to maintain a teaching staff that is 50 percent black and also permit the outlying districts to increase the black representation on their faculties appreciably" (Pet. Br. 53). Obviously, if petitioners had carried out a non-discriminatory hiring pattern, the numbers of black teachers employed by other school districts might have been correspondingly reduced.

requirement for employment as a teacher in the Hazelwood School District beyond eligibility for certification and possession of a health certificate is that a candidate be the "most competent" person available (Pet. App. 5a, 12b). Each of the District's 23 principals (all of whom are white) does his own hiring, and because his choice is rarely vetoed, he is vested with almost total discretion (Pet. App. 7b, 12b). Objective criteria such as number of years experience or possession of a master's degree are given little weight (Pet. App. 6a).[37] No evidence was presented below "which would indicate that any two principals apply the same criteria—objective or subjective—to evaluate applicants" (Pet. App. 12b).[38] One principal testified that interviewing an applicant was "like dating a girl, some of them impress you, some of them don't" (Pet. App. 12b). Finally, the process by which applicants are preselected for interviews is apparently quite arbitrary. As described by petitioners, the personnel director chose the applicants "by delving into his card file * * * until he has pulled the requested number of names for referral" (Pet. Br. 67).[39]

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[37] The court of appeals noted that "[p]rincipals are free to give whatever weight they desire to subjective factors in making their hiring decisions" (Pet. App. 12b).

[38] Petitioners allege that the process favors applicants most recently heard from but, as we noted (*supra*, n. 8), the evidence does not indicate that even this criterion was consistently applied.

[39] The present Superintendent of Schools described the District's lack of hiring standards (A. 60):

> Q. Has Hazelwood even developed any written policies or standards for interviewing for employing teachers?
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> A. No standards.

See also testimony of Francis Huss, the Coordinator for Secondary Education in the District (A. 48). Clifford Kirby, the former Superintendent of Schools, stated (Kirby Deposition 29):

> We had no objective measurements other than your subjective opinions of the person hooked onto the recommendations and their files from the placement office. That is the way we selected them.
>
> Q. By "subjective standards" did you mean the impression that was made in the interview, primarily? Was this the key?
>
> A. The word, "subjective," means my opinion of you. I am subjectively sitting here now measuring you, as you are me. I don't have any measuring device, and even the credentials that are on file for a person are the subjective opinion of the person who has those credentials there.

The court of appeals specifically noted that "[t]he law does not preclude Hazelwood from considering previously announced, non-discriminatory, subjective criteria in deciding whom it will hire, *Moore* v. *Bd. of Educ. of Chidester,* 448 F.2d 709, 713 (C.A. 8), as long as such factors are shown to be related to job performance" (Pet. App. 13b). There is a difference, however, between subjectivity and the failure to employ any standards in a consistent manner. Here the outcome of an unsupervised, arbitrary process in which applicants were selected by "delving" and in which no two principals applied the same hiring standards—subjective or objective—was visible in the pronounced statistical evidence indicating disproportionately low hiring of blacks. The presence of an arbitrary hiring process, together with statistics demonstrating the virtual exclusion of blacks from the work force, adds to the likelihood that the *prima facie* inference of discrimination drawn from those statistics is correct. Arbitrary hiring procedures have shown themselves to be all too susceptible to the abuses of discrimination. *Rowe* v. *General Motors Corp.,* 457 F.2d

348 (C.A. 5). As the court below noted, "[v]ague and subjective criteria may disguise discriminatory practices, whether or not that was the original intent. * * * Because Hazelwood's hiring procedures have spawned a disproportionately white faculty, we view them with skepticism" (Pet. App. 13b).

Petitioners attempt to utilize the standardless nature of Hazelwood's hiring procedures as a defense to the discrimination claim, asserting that in view of the subjective nature of the process, "a prima facie case of statistical discrimination cannot be rebutted" (Pet. Br. 22). However, the fact that a standard is "subjective" does not mean either that it is inarticulable or that it is incapable of uniform application. For example, an employer could introduce evidence to show specifically why each rejected black applicant was less desirable than the white applicants hired instead, based upon whatever criteria it applied. As we shall discuss in more detail (pp. 41-42, *infra*), petitioners simply did not attempt to explain why many of the rejected black applicants about whom evidence was taken were not hired. In the absence of such evidence, "the lack of objective guidelines for hiring * * * serve to corroborate, not to rebut, the racial bias pictured by the statistical pattern of the * * * work force." *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377, 1382 (C.A. 4), certiorari denied, 409 U.S. 982. See *Castaneda* v. *Partido*, No. 75-1552, decided March 23, 1977, slip op. 15.

Acceptance of Hazelwood's claim—that where there is an official policy of nondiscrimination and subjective standards, hiring decisions cannot be subject to judical

scrutiny—would largely insulate professional hiring from Title VII guarantees. But it is precisely because professional hiring standards must, to some extent, be subjective that they require careful scrutiny under Title VII where their application results in the selection of a disproportionately non-minority work force. Cf. *Rowe* v. *General Motors, supra.* The risk of discriminatory action increases greatly where the procedures are not only subjective but also diffused and standardless and "confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent." *Yick Wo* v. *Hopkins, supra,* 118 U.S. at 366-367.

The court of appeals properly decided that the absence of hiring standards adds weight to the *prima facie* presumption of discrimination raised by the statistical disparity. In the absence of any consistently applied hiring criteria, "race is the only identifiable factor explaining the disparity" in statistics. *Brown* v. *Gaston County Dyeing Machine Co., supra,* 457 F.2d at 1383. The court of appeals' decision is analogous in this respect to this Court's decision in *Turner* v. *Fouche,* 396 U.S. 346, 360-361:

> In sum, the appellants demonstrated a substantial disparity between the percentages of Negro residents in the county as a whole and of Negroes on the newly constituted jury list. They further demonstrated that the disparity originated, at least in part, at the one point in the selection process where the jury commissioners invoked their subjective judgment rather than objective criteria. The appellants thereby made

out a *prima facie* case of jury discrimination, and the burden fell on the appellees to overcome it.

D. THE FINDING THAT SIXTEEN REJECTED BLACK APPLICANTS HAD BEEN DISCRIMINATED AGAINST ON ACCOUNT OF RACE FURTHER CONFIRMED THE INFERENCE THAT A PATTERN OF DISCRIMINATION HAD OCCURRED

The court of appeals ruled that the United States established a *prima facie* case that each of 16 individual black applicants had been discriminated against on account of race, and that Hazelwood had failed to rebut that evidence (Pet. App. 15b-25b). These individual instances of discrimination buttress the inferences arising from the past history of discrimination, the absence of standards, and the current statistical disparities. Petitioners acknowledge that "[n]o question has been presented by us on certiorari specifically concerning the correctness of the court of appeals' judgment as to the 16 cases" and that "this Court * * * does not sit to resolve disputes over the weight of evidence" (Pet. Br. 62). Nevertheless, petitioners dispute the findings and holdings of the court below with regard to each of these 16 applicants.

Petitioners' argument that the court's evaluation of evidence regarding the rejected black applicants was "tainted" by its prior, "incorrect" evaluation of the statistical evidence is contradicted by the court's opinion. The court considered the evidence regarding these black applicants without regard to any of the other

evidence in the case."[40] The court of appeals specifically rejected the position that once the plaintiff has established its *prima facie* case of a pattern or practice of discrimination, the burden of proof shifts to the defendant to demonstrate that individual black applicants were not rejected on account of race: "We believe that for an applicant to be entitled to specific relief, the United States had the burden at trial of establishing a *prima facie* case of racial discrimination against him or her" (Pet. App. 15b). Quoting the four-pronged test enunciated by this Court in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802, for proof of an individual claim of employment discrimination, the court of appeals required the United States to establish, with regard to each rejected black applicant (Pet. App. 15b-16b):

> * * * (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

In light of the *prima facie* showing of a pattern or

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[40] The court below ruled that (Pet. App. 14b) this "statistical evidence * * * and * * * Hazelwood's hiring procedures * * * indicate a *prima facie* case of a pattern or practice of employment discrimination in violation of Title VII." The court continued (Pet. App. 14b; emphasis supplied):

> *Buttressing* this aspect of the Government's proof is evidence of actual discriminatory practices * * * in the rejection of some 16 black applicants * * *.

practice of discrimination, the court below incorrectly placed the initial burden of proof with regard to the individual rejected black applicants upon the United States.[41] However, the fact that it did so refutes petitioners' claim that the court's findings with regard to these applicants were tainted by alleged errors in the statistical evidence presented. Moreover, because these findings were made independently, they constitute an additional ground in support of the court's holding that the government established a *prima facie* case of a pattern or practice of discrimination.

Petitioners attempt to counter the findings of discrimination against individuals by arguing that the process by which these applicants were rejected did not violate Title VII,[42] and that "[t]he demonstrated legitimacy of this process, *without regard to the specific facts of each case,* should control" (Pet. Br. 68; emphasis supplied). But, under *McDonnell Douglas,* the alleged legitimacy of the general process cannot be determinative where individuals have proven a *prima*

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[41] See Brief for the United States and the Equal Employment Opportunity Commission, *International Brotherhood of Teamsters* v. *United States and Equal Employment Opportunity Commission,* Nos. 75-636 and 75-672, pp. 52-64 (argued January 10, 1977). As we there contend, a proper allocation of the burden of proof, after the government's *prima facie* showing of a pattern or practice of discrimination, would require petitioners to show that rejected minority applicants were not the victims of racial discrimination. Under that approach, many more than 16 individuals would be rebuttably presumed to be entitled to relief here.

[42] They attempt to establish this proposition by use of application statistics that are inaccurate and incomplete (*supra,* pp. 25-28).

facie discrimination case—just as "[p]roof of a racially representative workforce composition would not overcome a showing of racial discrimination in the treatment of an individual applicant for employment" (Pet. Br. 45).

We need not burden this brief with a complete analysis of the evidence regarding each of the individual rejected black applicants. The court of appeals' opinion reviews the facts as to each applicant who was found to be a victim of discrimination (Pet. App. 17b-25b). In an appendix to this brief we have detailed the evidence with respect to five individuals as demonstrative of the court of appeals' careful application here of the *McDonnell Douglas* standard to establish a *prima facie* case of discrimination. With respect to each of the five, Robert Howell, Willie Palmer, Cynthia Edmond, Georgia Shaw, and Timotheus Carson, the United States demonstrated that he or she (1) belongs to a racial minority, (2) applied and was qualified for a vacant position with the Hazelwood School District, and (3) was rejected, and (4) that, subsequently, Hazelwood continued to hire persons for these positions who were less or no better qualified. Under *McDonnell Douglas* the burden therefore shifted to the District to rebut the *prima facie* case. However, in each case the District presented no evidence of the reasons why a particular white was chosen over the rejected black. Petitioners' brief now claims that a particular black must not have impressed his interviewers as much as the hired white (Pet. Br. 78), or that the rejection of another black is explainable because a particular field is "competitive" (Pet. App. 9a), or that the District

may have decided that an interview would have been "pointless" (Pet. Br. 70). These hypotheses are mere conjecture, without evidentiary support. A *prima facie* case of discrimination cannot be rebutted by vague hypothetical explanations and *post hoc* theories. The burden was placed upon Hazelwood "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas* v. *Green, supra,* 411 U.S. at 802.[43] Hazelwood failed to do so in the district court, and that failure cannot be cured now.

Petitioners assert that 14 of the 16 rejected applicants cannot, as a matter of law, be considered qualified for employment within the meaning of the *McDonnell Douglas* standard because none of the 14 was interviewed by a Hazelwood school principal (Pet. Br. 72). Nothing in *McDonnell Douglas* suggests that an employer's failure to grant an interview can render the

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[43] The dissenting judge in the court of appeals stated that the majority opinion required that "every qualified black applicant • • • be hired in favor of similarly qualified whites • • •" (Pet. App. 29b), and that in ordering injunctive relief "[t]he majority • • • takes an unwarranted step in directing and monitoring the operation of a local school system, in effect undertaking the administrative and operational powers of the school board and officials" (Pet. App. 30b). But evidence that a qualified black applicant was rejected in favor of a less or equally qualified white applicant does not prove discrimination; it merely shifts the burden to the employer to explain his actions. Here the District did not meet its burden. Furthermore, although a federal court would not have the power to "direct" or "monitor" the activities of a school district absent a violation of the law, where such a violation has been found, the court has the power, as well as the duty, to fashion appropriate equitable relief. See, *e.g., Swann* v. *Board of Education,* 402 U.S. 1, 15-16, 28; *Griffin* v. *School Board,* 377 U.S. 218.

applicant "disqualified" and unable to establish a *prima facie* discrimination case. Here each of the 14 applicants met all of the objective qualifications ever established by the District. It was incumbent upon the District to show why, on "nondiscriminatory reasons," its selection procedures (including the procedures for providing interviews) excluded these black applicants whose qualifications were apparently better than, or equal to, those of the whites who were chosen for the jobs for which they applied. The failure to provide such evidence justifies the court's finding of discrimination with respect to the individual applicants. Moreover, in this case the presence of a historical pattern of discrimination, the pronounced statistical disparity in hiring and the use of standardless procedures make it especially inappropriate for the use of an arbitrary interview selection system to constitute a sufficient answer to a showing of *prima facie* discrimination under the four-pronged test of *McDonnell Douglas.*

Petitioners have argued strenuously that the mere presence of a standardless hiring procedure without more does not constitute discrimination, that a statistical disparity in the employment of blacks does not alone prove discrimination, that a school board may have simply passed over 16 black teacher applicants without discriminatory intent, and that a history of discrimination does not mean that discrimination continues to exist. Title VII does not require that each element of evidence in itself be sufficient to prove discrimination. So long as those elements add up to a *prima facie* showing of discrimination, the burden then

shifts to the defendant. The court of appeals properly decided that the cumulative effect of these four factors was sufficient to establish a *prima facie* case and shift the burden to the District to provide evidence adequately explaining its actions. Petitioners, however, chose to restrict their rebuttal to the testimony of one witness relating "the total number of teachers who applied and were hired during the 1971-72 and 1972-73 school years" and exhibits consisting of a "policy manual, policy book, staff handbook, and historical summary of the formation of the Hazelwood School District " (Pet. App. 7b). That did not satisfy petitioners' burden."

Petitioners repeatedly claim that the *prima facie* showing acted as an irrebuttable presumption that discrimination occurred. The court of appeals did state that in the face of a statistical showing, explanations based upon subjective standards would be entitled to little weight (Pet. App. 13b-14b). That may have overstated the case. Indeed, elsewhere in its opinion the court of appeals indicated unequivocally that "The law does not preclude Hazelwood from considering previously announced, nondiscriminatory, subjective criteria in deciding whom it will hire" (Pet. App. 13b).

" In a similar situation, this Court held in *Turner* v. *Fouche, supra,* 396 U.S. at 361 (footnotes omitted) :

> The testimony of the jury commissioners and the superior court judge that they included or excluded no one because of race did not suffice to overcome the appellants' prima facie case. • • • No explanation for this state of affairs appears in the record. The evidentiary void deprives the District Court's holding of support in the record as presently constituted. "If there is a 'vacuum' it is one which the State must fill, by moving in with sufficient evidence to dispel the prima facie case of discrimination."

In any event, the question does not arise in this case because petitioners did not come forward with any pertinent showing in the district court at all. No explanation of the system was given to demonstrate how the interview selection process worked or that it was not a screening device excluding qualified black applicants. Nor did petitioners show that on the basis of particular subjective standards the rejected black applicants had been found to be less desirable than the white applicants actually chosen for employment.

It may be that if petitioners had chosen to do so, they might have presented evidence sufficient to rebut the government's *prima facie* statistical showing. Petitioners might also have explained why black applicants were frequently told that there were no vacancies in their field and whites were later hired for the same position (Pet. App. 17b-19b). Petitioners might have provided a rational explanation of why black applicants were denied jobs because they lacked certification, although the same standard was not applied to white applicants (Pet. App. 18b-24b). Petitioners might also have presented evidence explaining why in the face of a preference for successful student teachers black applicants who had successfully completed student teaching in the District were not even interviewed (Pet. App. 17b-18b, 21b-22b).

Petitioners did not choose to shoulder the burden of persuasion below, and their failure to do so cannot be cured by tendentious statistical analysis arrayed for the first time in this Court. A similar situation was presented in *Castaneda* v. *Partida,* No. 75-1552, decided March 23, 1977, where the Court held that a state failed

to rebut a *prima facie* case of racial discrimination in the selection of grand juries. In that case, the jury commissioners were the only ones in a position to explain the apparent under-representation of Mexican-Americans, but they never testified to rebut a *prima facie* statistical case. Although "[t]he showing made by respondent * * * shifted the burden of proof to the State to dispel the inference of intentional discrimination," the state "[i]nexplicably * * * introduced practically no evidence" (slip op. 15). The Court declined to rely upon a new statistical analysis "since there are so many implicit assumptions in this analysis, and we consider it inappropriate for us, as an appellate tribunal, to undertake this kind of inquiry without a record below in which these assumptions were tested" (slip op. 7, n. 8). Because the *prima facie* showing had not been rebutted, the Court affirmed the court of appeals' holding that there had been a denial of equal protection in the selection of jurors (slip op. 16):

> [W]e are not stating that the statistical disparities proved here could never be explained in another case; we are simply saying that the State did not do so in this case. See *Turner* v. *Fouche,* 396 U.S. at 361.

A fortiori, here, where the *prima facie* case of racial discrimination was based on several substantial factors in addition to statistical disparities, the court below correctly ruled (Pet. App. 14b-15b):

> We hold that statistical evidence demonstrating a disparity between the proportion of blacks in Hazelwood's workforce and the proportion of blacks in the relevant labor market, when considered in light of Hazelwood's hiring procedures involving the use of vague and subjective criteria, indicate a *prima facie* case of a pattern or practice of employment discrimination in violation of Title VII. Buttressing this aspect of the Government's proof is evidence of actual discriminatory practices in the hiring of teachers during the period prior to the effective date of Title VII and in the rejection of some 16 black applicants discussed below. The Government's proof thus established a *prima facie* case. Hazelwood offered no evidence adequate to rebut the inference of discrimination created by the aforementioned evidence. We therefore reverse the judgment of the district court.

II

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AS APPLIED BY THE COURT OF APPEALS IS A CONSTITUTIONAL EXERCISE OF CONGRESSIONAL AUTHORITY

Petitioners assert that the application of Title VII to discrimination by state and local governments which is not "purposeful" cannot be sustained by Congress' powers under Section 5 of the Fourteenth Amendment.[45] Whether or not that view is correct, the question has no bearing on a Title VII case which, like the present one, involves purposeful discrimination. Congress acted well within its constitutional powers in

[45] Petitioners did not raise this constitutional challenge to Title VII either in the district court or in the court of appeals. The question is not properly raised in this Court in the first instance. *Duignan* v. *United States,* 274 U.S. 195, 200.

applying Title VII to state and local governments, and the Court need not in this case resolve the abstract question whether Title VII would be unconstitutional if applied to forbid wholly unintentional state action.

A. THE COURT OF APPEALS CORRECTLY HELD THAT PETITIONERS HAD ENGAGED IN A PATTERN OR PRACTICE OF INTENTIONAL RACIAL DISCRIMINATION IN VIOLATION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.

The premise underlying petitioners' constitutional argument—that there was no determination of purposeful racial discrimination in the employment practices of the District—is erroneous. From the outset, this case was litigated as a case of intentional discrimination. In his opening statement, counsel for the United States said (Tr. 8):

> We will present testimony * * * which will show that the absence of black professional employees does not result from chance but is the result of purpose.
>
> Further, we will show that the Hazelwood District has deliberately continued employment policies which limit the number of black applications.

The evidence in the record and the court of appeals' opinion amply demonstrate that the Hazelwood School District engaged in purposeful discrimination in hiring against blacks from its inception in 1949-1951 until at least the 1973-74 school year. The court specifically stated, for example, that "[i]n our view, it is *more than mere coincidence* that the use of [Hazelwood's hiring] procedures produced only a few black teachers" (Pet. App. 12b; emphasis supplied).

The practices of Hazelwood, and other school districts in St. Louis County, prior to 1954, need not be subjected to sophisticated analysis to determine intent to discriminate. The court below found (Pet. App. 3b), and petitioners concede (Pet. Br. 7), that the Hazelwood School District maintained, prior to this Court's decision in *Brown* v. *Board of Education,* 347 U.S. 483, an intentional policy of assigning only white teachers to teach in white schools.

The evidence also established that Hazelwood continued to discriminate intentionally after 1954. Hazelwood's practice of requiring racial identification on some of its teacher application forms until 1962-1963 (Pet. App. 4a, 3b; Pl. Ex. 62),[46] its advertisement requesting "white only" teacher applicants (A. 71; Pet. App. 3b), and its continuing practice of recruiting teachers only at predominantly white universities (Pet. App. 4b), cannot properly be characterized as "racially neutral" practices that have "unintended racially disparate results" (Pet. Br. 17). Nor should they have been disregarded by the court below. "The historical background of a decision is one evidentiary source [of proof of intent], particularly if it reveals a series of official actions taken for invidious purposes." *Village of Arlington Heights* v. *Metropolitan Housing Development Corp., supra,* slip op. 14. Together with the other evidence of purposeful discrimination, these recruiting practices establish a history of intentionally discriminatory action by the District.

[46] Prior to 1954, Hazelwood's teacher application form contained a space for racial identification, as well as a space for a photograph (Pet. App. 3b). Hazelwood was required to use racially identifiable forms prior to 1954 in order to comply with the Missouri state segregation law (Pet. Br. 11).

The court of appeals specifically relied on "evidence of actual discriminatory practices * * * in the rejection of some 16 black applicants" during the period after the 1972 amendments became effective (Pet. App. 14b). Although the court did not use the words "intentional" or "purposeful" to describe its findings and conclusions, its detailed analysis of the District's treatment of these individuals showed that it was determining whether the applicants were rejected "because of" or "on account of" race (see Pet. App. 17b-25b). Surely unrebutted and unexplained evidence that the District repeatedly rejected apparently qualified black applicants in favor of less well-qualified whites provides a proper basis for a finding of intentional discrimination.[47]

The court of appeals found it significant that each school principal is vested with almost total discretion to hire whom he pleases, and that "[a]ll of the elementary and secondary school principals in Hazelwood are white" (Pet. App. 12b). As the court of appeals stated in *Rowe* v. *General Motors Corp.*, 457 F.2d 348, 359 (C.A. 5) (quoted favorably by the court below (Pet. App. 13b)):

[47] Moreover, Hazelwood's refusal to hire, or even interview, Robert Howell and Georgia Shaw cannot be justified as an application of a racially neutral policy with unintended racially disparate effects since the District deviated from an otherwise neutral policy of giving preference to persons who had successfully student taught at Hazelwood (see p. 7, n. 9, *supra*). "Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decision-maker strongly favor a decision contrary to the one reached." *Village of Arlington Heights* v. *Metropolitan Housing Development Company, supra,* slip op. 14.

> [P]romotion/transfer procedures which depend almost entirely upon the subjective evaluation * * * are a ready mechanism for discrimination against Blacks much of which can be covertly concealed * * *. We and others have expressed a skepticism that Black persons dependent directly on decisive recommendations from Whites can expect nondiscriminatory action.

The Court of Appeals for the Fifth Circuit in *Rowe,* like the court of appeals in this case, was referring to purposeful invidious discrimination, which is allowed to flourish in a standardless, unsupervised hiring process. The court below noted that "[t]he hiring procedures used by Hazelwood are similarly susceptible to discrimination" (Pet. App. 13b). It was properly concerned that the procedures used by Hazelwood "may disguise discriminatory practices, whether or not that was the original intent" of the procedures (*ibid.*). And, having found on the basis of unrebutted evidence that intentionally discriminatory hiring practices did occur under those procedures, the court was not required to determine whether the procedures themselves were intentionally designed to produce that result. Even if they were not, that would not change the purposeful nature of the discrimination practiced by those authorized under those procedures to act on the District's behalf.

Nor did the court of appeals' reliance in part on statistical evidence convert this case into one involving a racially neutral standard with an unintended racial impact. The statistical evidence in this case, which illustrates "[t]he impact of the official action—whether

it 'bears more heavily on one race than another,' " is precisely the kind of evidence that this Court has held relevant to the issue of intentional discrimination. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp., supra,* slip op. 13.

The court of appeals viewed the statistical evidence "in light of Hazelwood's subjectively-based selection procedures" (Pet. App. 11b-12b), the historical evidence, and the incidence of individual discriminatory acts, and concluded that the paucity of black teachers in the Hazelwood District is the result of intentional discrimination. This "inquiry into such circumstantial and direct evidence of intent as may be available" (*Village of Arlington Heights, supra,* slip op. 13) comported with this Court's suggestion in *Arlington Heights* (slip op. 13-15) of proper methods of "determining whether racially discriminatory intent existed" (*id.* at 15). In light of petitioners' failure to come forward with racially neutral explanations of the government's *prima facie* showing, the statistics and other evidence "indicate[d] that race is the only identifiable factor explaining the disparity * * *." *Brown* v. *Gaston County Dyeing Machine Co.,* 457 F.2d 1377, 1382 (C.A. 4), certiorari denied, 409 U.S. 982 (quoted by the court below at Pet. App. 14b).

While this Court in *Arlington Heights* indicated that Fourteenth Amendment "cases are rare" in which "a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face" (slip op. 13, citing, *inter alia, Yick Wo* v. *Hopkins,* 118 U.S. 356, and *Gomillion* v. *Lightfoot,* 364

U.S. 339), such cases are of course less rare under a statutory scheme such as Title VII which shifts the burden of proof to the state after a *prima facie* showing of discrimination has been made (especially where, as here, the *prima facie* showing also includes direct evidence of intentional discrimination). Such congressional adjustment of the burdens of proof in litigation is a familiar method of enforcing the post-Civil War amendments which this Court has upheld in the context of voting rights. *South Carolina* v. *Katzenbach,* 383 U.S. 301, 335; *Georgia* v. *United States,* 411 U.S. 526, 536-539. It is a procedural means of enforcing those amendments which need not (*Beer* v. *United States,* 425 U.S. 130), and does not in this case, involve any substantive expansion of the constitutional prohibition.

This case, accordingly, does not present, and the Court need not decide, any question concerning the authority of Congress, under the principle of *Katzenbach* v. *Morgan,* 384 U.S. 641, and *Oregon* v. *Mitchell,* 400 U.S. 112, to prohibit employment practices of a state that do not involve intentional racial discrimination.[48]

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[48] We disagree, however, with petitioners' contention that in extending Title VII to public employment in the 1972 amendments Congress intended the rationale of *Griggs* v. *Duke Power Co.,* 401 U.S. 424, to be inapplicable (Pet. Br. 38-42), and with petitioners' alternative suggestion that the rationale of *Griggs* and its explanation in *Washington* v. *Davis,* 426 U.S. 229 and *General Electric Co.* v. *Gilbert,* No. 76-1589, decided December 7, 1976, should be re-examined (Pet. Br. 40-41, n. 13). The legislative history of the 1972 amendments contain repeated approving discussions of the *Griggs* rationale (see, *e.g.,* S. Rep. No. 92-415, 92d Cong., 1st Sess., pp. 5, 14 (1971)), as well as the explicitly expressed intent that employees of State and local government were to be afforded "the

B. TITLE VII AS APPLIED TO PROHIBIT DISCRIMINATION BY A PUBLIC EMPLOYER IS A PROPER EXERCISE OF THE CONGRESSIONAL COMMERCE POWER AND POWER TO ENFORCE THE FOURTEENTH AMENDMENT

As originally enacted, Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U.S.C. 2000e *et seq.*, forbade employment discrimination by private employers, and found its constitutional authority in the Commerce Clause. In 1972, Title VII was amended, among other things, to bring governments, governmental agencies and political subdivisions within its coverage. *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 449, n. 2. In so extending the coverage of Title VII, Congress asserted its authority under both the Commerce Clause, and Section 5 of the Fourteenth Amendment (see, *e.g.*, S. Rep. No. 92-417, 92d Cong., 1st Sess., p. 11 (1972)).

That the 1972 amendments to Title VII were intended as an enactment to enforce the Fourteenth Amendment was explained by the House Committee Report as follows (H.R. Rep. No. 92-238, 92d Cong., 1st Sess., pp. 18-19 (1971) (emphasis added)):

> The expansion of Title VII coverage to State and local government employment is firmly embodied in the principles of the Constitution of the United States. The Constitution has recognized that it is inimical to the democratic form of government to allow the existence of discrimination in those bureaucratic systems which most directly affect the daily interactions of this Nation's citizens. The clear intention of the Constitution, embodied in the Thirteenth and Fourteenth Amendments, is to prohibit all forms of discrimination.
>
> Legislation *to implement this aspect of the Fourteenth Amendment* is long overdue, and the committee believes that an appropriate remedy has been fashioned in the bill. Inclusion of state and local employees among those enjoying the protection of Title VII provides an alternate administrative remedy to the existing prohibition against discrimination perpetuated "under color of state law" as embodied in the Civil Rights Act of 1871, 42 U.S.C. § 1983.[49]

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same benefits and protections in equal employment as the employees in the private sector of the economy" (*id.* at 9; cf. *Chandler* v. *Roudebush*, 425 U.S. 840). Congressional power to adopt such prophylactic measures under Section 5 of the Fourteenth Amendment is supported by analogy to the congressional prohibitions of literacy tests upheld by this Court in *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 333-334, 337, and *Oregon* v. *Mitchell*, *supra*, 400 U.S. at 118, notwithstanding the Court's prior holding in *Lassiter* v. *Northampton County Bd. of Elections*, 360 U.S. 45, that the use of literacy tests as a qualification for voting is not *per se* unconstitutional. As the Court repeatedly has recognized, the post-Civil War amendments constituted "enlargements of the powers of Congress." *Ex parte Virginia*, 100 U.S. 339, 345, quoted in *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 454.

Nor do we agree with petitioners' suggestion (Pet. Br. 41-42), in reliance upon Mr. Justice Stevens' separate opinion in *Fitzpatrick* v. *Bitzer*, *supra*, that it would be incumbent on this Court to decide for itself whether the 1972 amendments were needed to secure the guarantees of the Fourteenth Amendment. It is for Congress to decide what legislation is necessary and proper in the exercise of its powers under either the commerce clause or Section 5 of the Fourteenth Amendment, and its choice of appropriate means for exercising those powers—so long as those means are not elsewhere prohibited by the Constitution—should be upheld. *E.g.*, *M'Culloch* v. *Maryland*, 4 Wheat. 316, 421; *Katzenbach* v. *Morgan*, *supra*, 384 U.S. at 650.

[49] See also S. Rep. No. 92-415, 92d Cong., 1st Sess., pp. 9-21 (1971).

There was, moreover, a substantial factual basis for the congressional determination that effective enforcement of Fourteenth Amendment rights required the application of Title VII to state and local governments.[50]

Petitioners claim that, as so applied, Title VII constitutes an impermissible intrusion into important state interests (Pet. Br. 21). But, as this Court stated in *Fitzpatrick* v. *Bitzer,* 427 U.S. 445, 455 in upholding an award of back pay under Title VII against the State's claim of sovereign immunity: "[T]here can be no doubt that this line of cases [*South Carolina* v. *Katzenbach, supra; Ex parte Virginia, supra*] has sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the states." See also *South Carolina* v. *Katzenbach,* 383 U.S. 301, 324.

The fact that, as so applied, Title VII—like the command of the Fourteenth Amendment itself—may influence the State's appointments of employees or officials is no bar to its enforcement. Else this Court would have upheld the prayer of the State in *Ex parte Virginia, supra,* to release a state judge from federal custody so that he could continue to perform his official duties. Instead the Court, in a contemporaneous interpretation of congressional power to enforce the Fourteenth Amendment, upheld the authority of Congress

[50] See *For All the People . . . By All The People: A Report of Equal Opportunity in State and Local Government Employment,* pp. 114, 128, 131-132 (1969); H. R. Rep. No. 92-238, *supra,* at 17; S. Rep. No. 92-415, *supra,* at 10. Cf. *Katzenbach* v. *Morgan,* 384 U.S. 641, 652-653.

to subject the judge to federal custody and indictment because of the discriminatory manner in which he was conducting his official state functions.

Nor does Title VII involve any interference with the discretion of state and local governments in determining the number of employees they will hire, the functions they will perform, the hours they will work, or the wages they will be paid. The state's ability to determine for itself the structure of state government employment thus remains unimpaired. Title VII merely provides remedial assurance that, in making its employment decisions within that structure, the state will fulfill its Fourteenth Amendment obligation not to discriminate on the basis of race or other improper criteria.[51] Accordingly, Title VII does not interfere with any attribute of state sovereignty constitutionally insulated from congressional exercise of the commerce power under this Court's decision in *National League of Cities* v. *Usery,* 426 U.S. 833.[52] In contrast to the situation in

[51] In thus requiring the state's employment decisions to be made on nondiscriminatory grounds, Title VII does not dictate whom the state shall employ. Petitioners miss this point (Pet. Br. 21-22) in focusing upon the relief available in a federal court for a violation of Title VII, rather than upon the limited nature of the obligations the state must meet in order to comply with Title VII.

[52] Indeed, in light of a similar difference in effect, most federal courts have concluded, principally on Fourteenth Amendment grounds, that the equal pay (for equal work regardless of sex) and age discrimination provisions of the Fair Labor Standards Act may constitutionally be applied to the states, even though *National League of Cities* struck down the application to the states of the wage and hour provisions. See *Usery* v. *Allegheny County Institution District,* 544 F.2d 148 (C.A. 3), certiorari denied, No. 76-1010, March 28, 1977, and cases cited in Appendix B, *infra.*

National League, compliance with Title VII costs the state nothing—its personnel expenditures remain totally self-determined.[53]

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

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[53] The fact that a state may incur some expense in order to remedy its noncompliance does not mean that Title VII impermissibly interferes with state sovereignty. *Fitzpatrick* v. *Bitzer, supra; Edelman* v. *Jordan,* 415 U.S. 651.

APPENDIX A

Robert Howell is black (A. 79). He applied for a secondary social studies position in Hazelwood, first in May 1971 (A. 79-80), and again in March 1973 (A. 338). He possessed a Missouri life teaching certification (A. 340). Howell was a student teacher at Hazelwood at the time of his first application for employment there,[54] and his cooperating teacher in the District was impressed with his abilities (A. 80). He had received academic awards and scholarships (A. 80-81). Subsequent to his application in 1973, several whites were hired to teach social studies in the District (Pet. App. 17b), including one applicant who had no experience, and who had been placed on probation, suspended, and dismissed from college (A. 98-115). Another white applicant hired subsequent to Howell's second application had no experience, average ratings on his interview form, and average grades (A. 245-262). The District presented no evidence whatsoever with regard to Howell, and it made no attempt to explain Howell's rejection, especially in light of the District's policy of giving preference to teacher applicants who had student taught in the District (Pet. App. 6a, 17b-18b).

Willie Palmer is black (A. 87). He applied for a teaching position with Hazelwood in May 1972 (A. 346). He indicated on his application that he had graduated from all black Stowe Teachers College in St. Louis in 1954 (A. 348). He applied for positions with the Hazel-

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[54] The courts below found that "[p]ersons with student • • • teaching experience at Hazelwood are given preference if their performance was satisfactory" (Pet. App. 6a, 17b-18b).

wood School District as a reading specialist, an administrator, science teacher, media specialist, curriculum lab., elementary grade teacher, or public relations officer (A. 346-347).[55] He had an excellent academic record (A. 380-389) and many years of experience teaching elementary grades, science and reading (A. 349). His application file contained many letters of recommendation (A. 354-371). Although Palmer was not certified as an administrator or science teacher, he was qualified to teach reading, or in the elementary grades (Pet. App. 24b-25b). Subsequent to Palmer's application, the District hired more than 50 persons to teach reading or elementary school for the 1972-73 school year (Pet. App. 24b-25b). Among them was an applicant (A. 278-308) who had been placed on academic probation in college (A. 306), and who received very mixed ratings on her interview forms (A. 286-287, 290-295), in spite of the fact that she had student taught in the Hazelwood District (A. 300). Another had mixed evaluations and average grades (A. 217-229). Yet another (A. 230-244) had been placed on academic probation for two semesters (A. 242-243). A fourth (A. 198-216) had very low grades in college (A. 213-216).

Cynthia Edmond is black (A. 84). She first applied for a social studies teaching position with Hazelwood in July 1972 (A. 330). She indicated on her application

[55] Petitioners assert that Palmer "ambiguously listed 'teacher in elementary grades' on his application" (Pet. Br. 70). All the application shows, however, is that he applied for several positions. The whites hired in preference to Palmer include one who applied for "all" elementary grades (A. 198) and another "2, 3, k, 1, 4, 5, 6" (A. 278).

that she had attended Fort Valley State College, Fort Valley, Georgia (A. 332), and she appeared personally at the Hazelwood District offices in the summer of 1973 (A. 85). Thus, the District had knowledge of Edmond's race. Although there is no evidence in the record that the District has ever maintained a "waiting list" of teacher applicants, Edmond was told by a District employee that "there were approximately five hundred teachers on the waiting list" (A. 85). Subsequent to Edmond's application, and her renewal of it the following year, the District hired white applicants who were less or no better qualified (see, *e.g.*, A. 98-115, 245-262). The District failed to present any evidence to specifically rebut the *prima facie* case established regarding Edmond.

Georgia Shaw is black (A. 9). She had student taught in the Hazelwood School District, and had received a favorable evaluation by her cooperating teacher (A. 406-407), applied for a teaching position in 1973-74 (A. 390-407), but was neither interviewed nor hired. At least thirteen whites with less or no better qualifications were subsequently hired to fill the positions for which Shaw had applied (Pet. App. 21b). Seven of these also lacked certification at the time of their application (*ibid.*). The United States therefore established a *prima facie* case of discrimination against Shaw, which the District made no attempt specifically to rebut. The district court erroneously ruled that Shaw was not qualified because she lacked certification at the time she applied (Pet. App. 16a), and no other explanation was put forward by the Dis-

trict for its failure to give Shaw preference in light of her successful student teaching experience.

Timotheus Carson is black (A. 8). He applied and was qualified for positions teaching secondary English, French, or German for the 1972-73 school year (A. 309-311). Carson was given an interview by the Hazelwood School District, and he received average and superior ratings by his interviewer (A. 317-318). The interviewer noted that Carson had 5 years of creditable experience, and was "interested in phase elective programs" (A. 318). However, the interviewer neglected to indicate whether Carson was recommended or not recommended (A. 318).[56] Subsequent to Carson's application the School District hired at least 23 teachers in Carson's field, many of whom were less or no better qualified than he (Pet. App. 21b). For example, one applicant (A. 116-133) had an interview rating no better than Carson's (A. 126-127), and had spent three semesters on academic probation while a student at the University of Missouri (A. 130-133). Another successful applicant (A. 149-163) had spent four semesters on academic probation at Southeast Missouri State University (A. 160-163). The District presented no evidence to explain why Carson was not hired.

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[56] On the face of Carson's application, in a box labeled "for Personnel Office Use Only," it is indicated that Carson was "Not Recommended" (A. 309). There is no indication who made that recommendation however.

APPENDIX B

CASES DECIDED AFTER *NATIONAL LEAGUE OF CITIES* v. *USERY*, 426 U.S. 833, PASSING UPON THE CONSTITUTIONALITY OF THE EQUAL PAY ACT AND THE AGE DISCRIMINATION IN EMPLOYMENT ACT AS APPLIED TO STATES AND THEIR SUBDIVISIONS

Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. 206(d)

a. Cases upholding the Act

Usery v. *Allegheny County Institution District*, 544 F.2d 148 (C.A. 3), certiorari denied, No. 76-1010, March 28, 1977.

Christensen v. *State of Iowa*, 417 F. Supp. 423 (N.D. Iowa).

Usery v. *Charleston County School District*, D. S.C., No. 76-248, decided August 24, 1976.

Usery v. *Sioux City Community School District*, N.D. Iowa, No. C-76-4024, decided August 20, 1976.

Usery v. *Fort Madison Community School District*, S.D. Iowa, No. C-75-62-1, decided September 1, 1976.

Usery v. *Bettendorf Community School District*, 423 F. Supp. 637 (S.D. Iowa).

Usery v. *Berkeley Unified School District*, N.D. Cal., No. C-75-1558 SAW, decided September 27, 1976.

Usery v. *Kent State University,* N.D. Ohio, No. C75-550, decided October 6, 1976.

Usery v. *Washoe County School District,* D. Nev., No. R-75-216 BRT, decided October 13, 1976.

Usery v. *University of Nevada, Reno,* D. Nev., No. R-75-62 BRT, decided October 13, 1976.

Usery v. *Dallas Independent School District,* 421 F. Supp. 111 (N.D. Tex.).

Usery v. *University of Texas at El Paso,* W.D. Tex., No. EP-75-CA-221, decided October 14, 1976.

Usery v. *Memphis State University,* W.D. Tenn., No. C-75-54, decided October 29, 1976.

Usery v. *Baltimore County School District,* D. Md., No. K-76-762, decided November 16, 1976.

Usery v. *City of Brockton,* D. Mass., No. 76-2265-M, decided November 9, 1976.

Usery v. *Morrissey,* D. Mass., No. CA 74-2311-G, decided November 15, 1976.

Usery v. *A&M Consolidated Independent School District,* S.D. Tex., No. 74-H-1532, decided November 30, 1976.

Usery v. *Tennessee Technological University,* M.D. Tenn., No. 75-7-NE-CV, decided December 14, 1976.

Usery v. *Austin Peay State University,* M.D. Tenn., No. 75-42-NA-CV, decided December 14, 1976.

Usery v. *Kenosha Unified School District Number One,* E.D. Wisc., No. 73-C-399, decided December 13, 1976.

Usery v. *City of Sheboygan,* E.D. Wisc., No. 76-C-209, decided December 13, 1976.

Brown v. *County of Santa Barbara,* C.D. Cal., Nos. 75-3492-HP and 75-3978-HP, decided January 14, 1977.

National League of Cities v. *Marshall,* D. D.C. (three-judge court), No. 74-1812, decided January 31, 1977.

Usery v. *Eastern Kentucky University,* E.D. Ky., No. C.A. 76-15, decided January 21, 1977.

Usery v. *Council Bluff Community School District,* S.D. Iowa, No. 76-26-W, decided January 27, 1977.

Usery v. *Oregon,* D. Ore., No. 74-629, decided February 12, 1977.

b. Cases holding the Act invalid

Howard v. *Ward County,* 418 F. Supp. 494 (D. N.D.) (Title VII case denying Equal Pay Act jurisdiction but applying Equal Pay Act standards to afford relief to employee of county).

Usery v. *Owensboro-Daviess County Hospital,* 423 F. Supp. 843 (W.D. Ky.).

Age Discrimination in Employment Act of 1967, 81 Stat. 602, 29 U.S.C. 621 *et seq.*

Cases upholding the Act

Usery v. *Board of Education of Salt Lake City,* 421 F. Supp. 718 (D. Utah).

Springer v. *City of Los Angeles,* C.D. Cal., No. CV 76-2449-FW, motion to dismiss denied November 24, 1976.

Aaron v. *Davis,* W.D. Ark., No. LR-76-C-16, motion to reconsider judgment for plaintiff denied December 9, 1976.

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